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No. 88-1121

In the Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN G. BRADLEY, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioners' tort action is barred by their failure to file an administrative claim within two years of the automobile accident underlying their action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A16) is reported at 856 F.2d 575. The order of the district court (Pet. App. A2-A4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1988. A petition for rehearing was denied on October 5, 1988 (Pet. App. A17). The petition for a writ of certiorari was filed on January 3, 1989. Petitioners invoke (Pet. 2) this Court's jurisdiction under 28 U.S.C. 1258.[1]

[1] Although petitioners cited 28 U.S.C. 1258, which governs review of decisions of the Supreme Court of Puerto Rico, review is appropriate under 28 U.S.C. 1254(1).

STATEMENT

In June 1985 the petitioners were injured in an automobile accident with a vehicle owned and operated by Donald Seibel, a civilian employee of the United States Navy traveling on business. Petitioners subsequently filed a complaint against Seibel in federal district court three days before the applicable two-year state statute of limitations would have expired. Petitioners assert that they were not aware at that time that Seibel was a government employee. Pet. App. A8-A9.

Pursuant to the Federal Drivers Act, 28 U.S.C. 2679(b)-(e) (1982), the government certified that Seibel was acting within the scope of his employment at the time of the accident and sought to substitute the United States as the defendant under Section 2679(d). The government also argued that, following the substitution, the complaint should be dismissed because the petitioners had not filed an administrative claim with the Navy within two years of the accident, as required under the Federal Tort Claims Act by 28 U.S.C. 2401(b).

The district court substituted the United States as defendant and then dismissed the complaint, holding that the filing of an administrative claim "is a jurisdictional prerequisite to suit." Pet. App. A3. The court rejected petitioners' argument that they should be excused from filing a claim under the circumstances of this case. It concluded that, while some courts have waived the administrative claim requirement "where 'fairness dictates' " (*ibid.*, quoting *Kelley* v. *United States*, 568 F.2d 259, 262 (2d Cir.), cert. denied, 439 U.S. 830 (1978)), waiver should not be allowed here because the petitioners did not inquire about Seibel's employment status within the two-year limitations period. Pet. App. A3-A4.

The court of appeals affirmed. Pet. App. A7-A16. After noting that Section 2401(b) provides that a tort claimant must file an administrative claim within two years after the claim accrues and that, under Section 2679(b), the remedy against the United States is exclusive, the court stated: "It is perfectly clear that if the foregoing sections are applied the way they are written, the order of the district court must be affirmed. Seibel was driving his vehicle within the scope of his employment at the time of the accident. Thus, [petitioners'] exclusive remedy was against the United States. But [petitioners] did not pursue that remedy by filing a written claim within two years and thus this action is barred." Pet. App. A11. With respect to cases such as *Kelley,* the court stated that it was not deciding "whether there might be a basis for some relaxation if it were in fact impossible for a diligent claimant to present a notice within two years of the claim accruing" because petitioners "do not present a situation warranting exceptional relief." *Id.* at A15.

DISCUSSION

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (Nov. 18, 1988), which was enacted after the court of appeals issued its decision and denied rehearing in the present case, amended Section 2679 to change the rules governing tort claims such as this.[2] Section 2679(d) now

[2] The main effect of the Act is to overrule *Westfall* v. *Ervin,* No. 86-714 (Jan. 13, 1988), in which this Court concluded that federal employees acting within the scope of their employment could be sued in state common law tort actions unless they were exercising discretion. H.R. Rep. No. 700, 100th Cong., 2d Sess. 2-4 (1988). The Act expands the provision that was formerly the Federal Drivers Act so that the United States is to be substituted as the defendant in any common law tort action whenever a government employee was acting within the

provides: "Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim * * *, such claim shall be deemed to be timely presented under section 2401(b) of this title if – (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action." Pub. L. No. 100-694, § 6, 102 Stat. 4565. In light of this recent amendment, problems such as the one presented here should not arise in the future. Since petitioners' claim would have been timely if it had been filed on the date they commenced their civil action, they would have been able to file an administrative claim within 60 days after the district court dismissed their claim. For that reason, any differences between the decision below and decisions such as *Kelley* are of little if any prospective importance; thus, plenary review of the question presented by petitioners is not warranted.

The Act expressly provides that it applies to pending cases. Pub. L. No. 100-694, § 8(b), 102 Stat. 4565-4566. However, petitioners were not able to file an administrative claim that would be deemed timely filed under the amended Section 2679(d) because the district court dismissed their complaint more than 60 days before the amendment was enacted.[3] Nor are they aided by Section

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scope of his employment at the time of the allegedly tortious act. Pub. L. 100-694, § 5, 102 Stat. 4564 (amending 28 U.S.C. 2679(b)).

[3] The district court dismissed the case in February 1988. Pet. App. A1. The court of appeals affirmed in September (*id.* at A7) and denied rehearing en banc in October (*id.* at A17). The new Act took effect in November, and the petition for a writ of certiorari was filed in January 1989.

8(d) of the Act, 102 Stat. 4566, which provides additional time to claimants whose claims accrued before the Act was enacted, but only when the governing state statute of limitations, unlike the applicable statute of limitations here, is longer than two years.[4]

We believe that Congress generally intended to allow persons such as petitioners to file administrative claims that would be deemed timely.[5] This case in its present posture fails to qualify solely because of the highly unusual circumstance that it was on appeal, rather than in the district court, when the Act was enacted—a situation we think Congress failed to deal with only through inadvertence. We therefore suggest that this Court vacate the judgment below and remand with instructions that the district court enter a new judgment of dismissal. Petitioners could then file an administrative claim that would be deemed timely under amended Section 2679(d).

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[4] Section 8(d) provides: "With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented * * * shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act."

[5] The House Report stated: "Persons who have initiated a lawsuit but never submitted an administrative claim to the Government will not lose their right to pursue a lawsuit for having failed to submit such a claim." H.R. Rep. No. 700, 100th Cong., 2d Sess. 8 (1988).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded in order that the district court may enter a new judgment of dismissal.

Respectfully submitted.

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